

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GREYSTONE NEVADA, LLC et al.,

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Plaintiffs,

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vs.

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2:11-cv-01424-RCJ-CWH

ANTHEM HIGHLANDS COMMUNITY
ASSOCIATION,

)

ORDER

Defendant.

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)

These consolidated removed class actions arise out of the installation in new homes of allegedly defective high-zinc-content brass (“yellow brass”) plumbing fittings.¹ Pending before the Court is Third-party Defendants’ motion to dismiss the Third Party Complaint and strike the class allegations therein, as well as three motions to reconsider, a motion to shorten time, and a motion to extend time.

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¹The cases are factually related to the *Slaughter v. Uponor* case, which has been reversed and remanded, and which is once again pending before the Court. The Court has not consolidated the present cases with the *Slaughter* case, and the Court of Appeals’ ruling in *Slaughter* does not affect the present cases, which concern arbitration requirements, as opposed to class action certification and the interplay between Rule 23 and the construction-defect notice procedures under state law.

1 **I. FACTS AND PROCEDURAL HISTORY**

2 On or about June 30, 2011, Defendant Anthem Highlands Community Association
3 (“Anthem Highlands”) forwarded to Plaintiffs Greystone Nevada, LLC (“Greystone”) and U.S.
4 Home Corp. (“U.S. Home”) notices of construction defects (the “Notices”) pursuant to Nevada
5 Revised Statutes (“NRS”) section 116.3102(d) [sic]. (*See* Compl. ¶ 7, Sept. 2, 2011, ECF No. 1).

6 The Notices stated that Anthem Highlands, in its statutory representative capacity,
7 thereby made the claims against Plaintiffs for construction defects in Anthem Highlands’
8 members’ homes based upon the installation of plumbing systems with defective yellow brass
9 components. (*Id.* ¶¶ 8–9). Each of the individual homeowners in Anthem Highlands (the
10 “Homeowners”) had previously entered into arbitration agreements with Plaintiffs, agreeing to
11 arbitrate potential disputes, and these agreements are alleged to be covenants running with the
12 land enforceable against any present owners. (*See id.* ¶ 11).

13 Plaintiffs sued Anthem Highlands in this Court on five nominal causes of action: (1)–(3)
14 declaratory judgment (impliedly under 28 U.S.C. § 2201); (4) injunctive relief (impliedly under
15 § 2202); and (5) compulsion of arbitration under 9 U.S.C. § 4.² Defendants moved to dismiss for
16 lack of subject matter jurisdiction and for failure to state a claim, and Plaintiffs moved to compel
17 arbitration, i.e., for offensive summary judgment on the fifth cause of action. The Court denied
18 the motions to dismiss, finding that there was diversity jurisdiction supporting the claims,
19 because Defendants had statutory authority to sue on behalf of the individual homeowners,
20 making them real parties in interest under the rules, whose claim was the aggregate of the claims
21 of the individual parties it represented. The Court also found that Plaintiffs had sufficiently
22 stated a claim. The Court granted the motion to compel arbitration in part, ruling that arbitration

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²In the ‘1422 Case, Greystone sued Defendant Fiesta Park Homeowners’ Association
25 (“Fiesta Park”) upon similar facts, using a substantially identical complaint. The actions have
been consolidated, with the present case as the lead case.

1 was required as to any homeowner who had individually signed the arbitration agreement, but
2 that the arbitration agreement was not a real covenant enforceable against a subsequent
3 purchaser.³ The Court left it to the arbitrator(s) whether homeowners could consolidate their
4 arbitration hearings under the arbitration agreement. The Court refused to dismiss the claims for
5 declaratory and injunctive relief based upon lack of jurisdiction. Finally, the Court solicited a
6 proposed consolidated judgment compelling arbitration. Plaintiffs submitted a proposed
7 judgment, which the Court signed. The Judgment requires arbitration by all homeowners
8 identified in Exhibit A thereto, which lists 271 homeowners (counting tenants-in-common as a
9 single party). The operative part of the judgment reads:

10 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that in
11 accordance with the Court's February 24, 2012 Order, judgment is hereby entered in
12 these consolidated actions against the Homeowners compelling them to arbitrate any
13 and all claims they have related to alleged "yellow brass" plumbing components and
systems within their respective Properties, including any and all claims related to the
January 27, 2011 and June 30, 2011, NRS 40.600, *et seq.* Notices of Defects
forwarded to Plaintiffs by Defendants on behalf of the Homeowners. The arbitrations
must proceed pursuant to the terms of the Arbitration Agreements.

14 The Court shall retain jurisdiction in these actions over the homeowners listed
15 in Exhibit "A" for the purposes set forth within sections 9 though 16 of the Federal
Arbitration Act (9 U.S.C. § 9, *et seq.*).

16 (J. 2:3–12, Mar. 14, 2012, ECF No. 31). The parties filed several motions to reconsider, to
17 dismiss, and to stay the case. The Court denied the motions to reconsider, granted the motions to
18 dismiss the Counterclaim in part, with leave to amend in part, denied the motions to stay, struck a
19 motion to dismiss filed improperly under Case No. 2:11-cv-1422, and order the parties to file a
20 joint status report listing which homeowners are and are not required to arbitrate consistent with
21 the Court's rulings thus far and discussing Article III standing under *Hunt v. Washington State*
Apple Advertising Commission, 432 U.S. 333 (1977).

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25 ³At oral argument, Plaintiffs retracted their argument that the agreements were real
covenants and agreed to pursue arbitration only against those homeowners who had signed the
agreements.

1 **II. LEGAL STANDARDS**

2 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
3 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
4 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
5 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
6 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
7 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
8 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
9 failure to state a claim, dismissal is appropriate only when the complaint does not give the
10 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
11 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
12 sufficient to state a claim, the court will take all material allegations as true and construe them in
13 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
14 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
15 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
16 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
17 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation
18 is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,
19 550 U.S. at 555).

20 “Generally, a district court may not consider any material beyond the pleadings in ruling
21 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
22 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
23 & Co.

24 , 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
25 whose contents are alleged in a complaint and whose authenticity no party questions, but which
are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)

1 motion to dismiss” without converting the motion to dismiss into a motion for summary
2 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
3 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
4 *Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
5 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
6 summary judgment. See *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
7 2001).

8 III. ANALYSIS

9 A. Motion to Dismiss

10 The class identified in the TPC consists of all yellow-brass-aggrieved “owners or
11 residences constructed in the Anthem Highlands community . . .” (See Answer, Counterclaim,
12 and TPC 29, Mar. 9, 2012, ECF No. 27). Defendants bring eight class claims against TPD. TPD
13 ask the Court to dismiss the TPC for three reasons: (1) lack of Article III standing; (2)
14 impermissible claim-splitting; and (3) failure to state a claim. The Court grants the motion based
15 upon impermissible claim-splitting. As the Court recently ruled in a related case:

16 A suit is duplicative and should be dismissed for improper claim splitting if an earlier
17 suit by the same plaintiff against the same defendant for the same claim is already
18 pending such that the eventual adjudication of the previous suit would preclude the
19 claim in the later-filed suit. See *Adams v. Cal. Dep’t of Health Servs.*, 487 F.3d 684,
688–89 (9th Cir. 2007). Movants argue that the rule should apply where the same
law firms bring a duplicative class action on behalf of the same class and against the
same defendants, albeit with different named plaintiffs.

20 The Court rules that the *Adams* anti-claim-splitting rationale applies in the
21 present context, at least as against the Uponor Defendants. In such cases, a defendant
22 is forced to defend duplicative class actions simultaneously. Plaintiffs may pursue
23 their claims here individually (though they may not then join a class in a case with
24 duplicative claims), but they may not make Defendants defend a duplicative class
action, at least not in the way they have done . . . here. Although two groups of
attorneys may bring duplicative class actions with different named plaintiffs in a race
towards certification, here, the same group of attorneys has brought the duplicative
actions, obviating the concerns in the contrary example where different named
plaintiffs and their attorneys are competing for bonuses and attorney’s fees,
respectively, via the race to certification. Plaintiffs’ attorneys are of course not

1 adverse to themselves, and insofar as they might argue that their different sets of
2 named plaintiffs have adverse interests in separately prosecuting the duplicative
3 actions because they are competing for class representative bonuses, it is the
attorneys themselves who have (potentially unethically) created this direct conflict
of interests between their own clients in the present matter.

4 In an appropriate case, the class of plaintiffs could be narrowly defined to
5 include only those homeowners in certain developments, such that multiple class
actions against the same defendants but by different groups of homeowners would
6 not necessarily violate the anti-claimsplitting rule. But here, as in the other related
7 cases, the class is very broadly defined to include every yellow-brass-aggrieved
homeowner in southern Nevada. The *Slaughter* and *Fulton Park* cases preclude the
present class action as against Uponor Defendants. The Court will therefore grant
the motion to dismiss Uponor Defendants.

8 (Order 18:12–19:13, July 10, 2012, ECF No. 104 in Case No. 2:11-cv-1498). Likewise here, the
9 determination of the *Slaughter* and *Fulton Park* cases, i.e., the certification of the class in either
10 case, would preclude the present claims. Although the present putative class includes only those
11 homeowners in the Anthem Highlands community, the putative classes in *Slaughter* and *Fulton*
12 *Park* also include those homeowners.

13 **B. Motions to Reconsider**

14 Plaintiffs via this action sought to compel arbitration by “original purchasers” of the
15 units, i.e., those who had purchased those units directly from the developer. In its February 24
16 and July 9 orders, the Court noted that the dispositive issue with respect to the requirement to
17 arbitrate was not from whom a particular owner had purchased his unit, but whether there existed
18 any arbitration agreement binding upon that owner. Arbitration is required (or not) based upon
19 agreements to arbitrate. Plaintiffs have identified no statute or principle of law requiring
20 arbitration based upon whether a unit owner has purchased his unit directly from the builder or
21 developer. The Court noted in its July 9 order that the seven owners whom Defendant had
22 identified as being “subsequent purchasers” allegedly not subject to arbitration had in fact signed
23 agreements to arbitrate construction defect claims. In some cases the agreements were part of the
24 purchase agreement, and in some cases they were separate agreements to arbitrate, but each of
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1 the seven identified unit owners were bound to arbitrate. The Court therefore reaffirmed its
2 previous ruling that any owner who had signed an arbitration agreement was required to arbitrate,
3 and it ordered the parties to file a joint status report identifying which unit owners were and were
4 not required to arbitrate according to the Court's ruling.⁴

5 The Court had also noted in its February 24 order that at least one of the exemplar
6 arbitration agreements identified by Plaintiffs was not a real covenant, i.e., did not "run with the
7 land." In the present motion, Plaintiffs argue that the Court "mistakenly" noted in its February
8 24 order that Plaintiffs had admitted that the covenants did not run with the land. But it in fact
9 appears that counsel made the admission on the record at one point, although counsel later
10 appeared to attempt to preserve the issue. Counsel argues that they did not intend to make the
11 admission. The transcript, attached as Exhibit 2 to the present motion, also notes that
12 Defendant's counsel later argued that they had moved to dismiss the claim to compel arbitration
13 as against "subsequent purchasers" and that the motion had been fully briefed. The Court then
14 noted that it was prepared to rule whether to dismiss as to "subsequent purchasers," i.e., those
15 whose only connection to an arbitration agreement was the fact that they had purchased a unit
16 from a person who had signed such an agreement, were bound to arbitrate. Counsel for Plaintiffs
17 asked for leave to amend, but the Court noted amendment would be futile, because the claim was
18 stated as sufficiently as it could be as a factual matter—it was a pure question of law. Counsel
19 for Plaintiffs argued that the claim was sufficient, and the Court noted that it disagreed. The
20 Court noted that it intended to dismiss the claim insofar as Plaintiffs intended to hold subsequent
21 purchasers to the arbitration agreements.

22 The Court noted in its July 9 order that because it had compelled arbitration against any

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24 ⁴If necessary, the Court can make this determination on its own by examining the
25 documentary evidence, owner-by-owner, but the Court should be able to expect that the parties
can amicably delineate which owners must arbitrate according to a good faith interpretation of
the Court's ruling.

1 unit owner who had signed an agreement to arbitrate, and because the agreements did not run
2 with the land, that it appeared Plaintiffs had obtained all the relief they could obtain in the case.
3 The Court noted that certain counterclaims appeared to be the only claims keeping the case
4 open—counterclaims that the Court has noted are barred by the anti-claim-splitting rule due to
5 the *Slaughter* cases—and it asked the parties to brief why the Court had jurisdiction over those
6 claims.⁵ It is this language Plaintiff asks the Court to reconsider. Plaintiffs argue that the Court
7 appears to have granted summary judgment to Defendant on Plaintiffs' fifth cause of action to
8 compel arbitration against subsequent purchasers. The Court clarifies that it considers its ruling
9 on the issue final. The arbitration clauses—at least the arbitration clauses the Court has seen in
10 the case thus far—do not run with the land.

11 Next, Plaintiffs ask the Court to reconsider its denial of their motion to dismiss the
12 counterclaim for violation of Nevada's Deceptive Trade Practices Act, because Defendants have
13 withdrawn that counterclaim as against Plaintiffs in their opposition to Plaintiff's previous
14 motion to dismiss. Plaintiffs appear to be correct. The Court grants the motion.

15 Next, Defendant asks the Court to reconsider dismissal of the strict liability counterclaim
16 and also to clarify that Plaintiffs will not be able to inspect every single home in a given
17 development, but only a reasonable representative sample. The Court declines to reconsider
18 dismissal. Defendants also ask the Court to certify the question to the Nevada Supreme Court in
19 the alternative or to certify the question for immediate appeal under Rule 54(b). The Court will
20 not certify the question to the Nevada Supreme Court. The Court clarifies that Defendants are
21 correct that only inspection of a representative sample is required. Of course, if Plaintiffs
22 voluntarily repair every representative home they inspect, the class action may fail for lack of

23 ⁵The parties' joint status report indicates some disagreement between the parties, but the
24 parties agree that the Court has jurisdiction over the original claims pursuant to 28 U.S.C.
25 § 1332(a) even if the defect counterclaims are barred, because there remain unresolved issues as
to the arbitration claims.

1 typicality, because class members must share a typical harm, and part of the harm is that the
2 developer failed to repair after being given an opportunity to inspect. Also, any eventual class
3 member that does not opt out will have to submit to an opportunity to inspect and repair as part
4 of the relief in any final judgment.

5 **C. Other Motions**

6 Uponor asks the Court to extend the time for it to respond to a third-party complaint until
7 the Nevada Supreme Court determines whether there is personal jurisdiction over it in Nevada.
8 As recounted in several orders in several cases, this Court has determined there is jurisdiction
9 under federal law, and the decision of the Nevada courts are inapposite. Finally, Plaintiffs ask
10 the Court to shorten time on their motion to reconsider. The Court denies the motion as moot.

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CONCLUSION

IT IS HEREBY ORDERED that the Motion to Dismiss Third Party Complaint and Strike Class Allegations (ECF No. 77) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Reconsider (ECF No. 82) is DENIED.

IT IS FURTHER ORDERED that the Defendants' Motion to Reconsider (ECF No. 91) is GRANTED.

8 IT IS FURTHER ORDERED that Defendants' Motion to Reconsider (ECF No. 94) is
9 DENIED. The Court declines to reconsider dismissal of the strict liability claims or to certify for
10 immediate appeal or certify the issue to the Nevada Supreme Court. The Court clarifies that
11 Plaintiffs may only inspect a representative sample of the homes (up to 10%, which Plaintiffs
12 may select).

13 IT IS FURTHER ORDERED that the Motion for Extension of Time (ECF No. 73) and
14 the Motion to Shorten Time (ECF No. 84) are DENIED.

IT IS SO ORDERED.

Dated this 14th day of January, 2013.

~~ROBERT E. JONES
United States District Judge~~